No. 5377

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ORIENT INSURANCE COMPANY (a corporation), and THE EMPLOYERS' FIRE INSURANCE COMPANY (a corporation),

Plaintiffs in Error,

vs.

CLEMENTE ARIASI,

Defendant in Error.

OPENING BRIEF FOR PLAINTIFFS IN ERROR.

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Attorneys for Plaintiffs in Error.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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I.

INTRODUCTION.

This is an action instituted by Clemente Ariasi as plaintiff (here the defendant in error), against the Orient Insurance Company and The Employers' Fire Insurance Company as defendants (here plaintiffs in error), for the purpose of recovering from the first named company the sum of $5,000.00, and from the second named company the sum of $1,500.00, alleged to be due, owing and unpaid from them respectively to plaintiff under fire insurance policies by them issued and delivered to him insuring him against loss or damage by fire to the property in said polices described.

To the complaint in said action separate answers were interposed by the defendants, wherein certain allegations in said complaint are admitted and certain other allegations therein are denied, and in said answers there are then set up the followning affirmative defenses, namely:

(1) That plaintiff was guilty of concealment and misrepresentation in violation of the terms of his policies, which precludes him from recovering thereunder;

(2) That plaintiff was guilty of fraud and false swearing in violation of the terms of his policies, which precludes him from recovering thereunder;

(3) That the hazard to the property in said policies described was greatly increased by means within the control of the plaintiff, which increased hazard continued right up to and at the time of the fire in his complaint alleged, in violation of the terms of his policies, which precludes him from recovering thereunder;

(4) That at the time of the fire in said complaint alleged plaintiff was not the unconditional and sole owner of the property in said policies described, which precludes him from recovering under said policies.

As to the first of these affirmative defenses, plaintiffs in error have satisfied themselves, since the trial of said cause, that concealment and misrepresentation that will avoid a policy of insurance must be such as was done and committed prior to the issuance thereof, while the concealment and misrepresentation here complained of occurred after the fire in plaintiff's complaint alleged. Plaintiffs in error, therefore, do not rely on that ground on the hearing of this writ of error. On all the other grounds however they do rely.

On the trial of said cause judgment was made and entered therein in favor of the plaintiff and against the defendants as prayed for in plaintiff's complaint, and the case is now before this court for review on a writ of error, based upon eighteen different assignments of error, but all of which we believe can be disposed of under the following contentions, namely:

(1) That the evidence introduced at the trial of said cause was and is not only insufficient to justify the decision of the court, and the judgment made and entered thereon, but that upon such evidence judgment should have been made and entered in said cause in favor of the defendants and against the plaintiff;

(2) That the decision of the court, and the judgment made and entered thereon are, and that each of them is, against law;

(3) That errors of law were committed on the trial of said cause to the prejudice of defendants, as against which defendants protected themselves by exceptions;

and the plaintiffs in error will now endeavor to show to this court that in each of these contentions they are correct, and that because thereof the judgment here under review should not only be reversed, but that judgment in said cause should be directed by this court to be made and entered in favor of said plaintiffs in error and against the defendant in error.

II.

AS TO THE FACTS IN THE CASE.

As to the facts in this case there is absolutely no dispute whatever. They are all admitted either in the

pleadings or in stipulations made by the attorneys for the respective parties in open court at the time of the trial of said cause, and are as follows, to-wit:

Each of the policies of insurance involved in this action was introduced in evidence by the plaintiff, the policy of the Orient Insurance Company as Exhibit 1, and that of the Employers' Fire Insurance Company as Exhibit 2. (See paragraph 2, page 78 of Trans. of Record.) Copies thereof are attached to and made a part of the complaint in this action and will be found on pages 12 to 24 of said transcript. Under stipulation of the parties, which appears on pages 140 to 141 of said transcript, only one of these policies appears in full in the Transcript of Record on file herein, and it will be noted on examination thereof that in each of said policies it is specifically provided as follows, to-wit:

> (1) "The company will not be liable beyond the actual cash value of the interest of the insured in the property at the time of loss"
>
> (Line 15, page 1 of Policies; lines 1, 2, 3, page 11, Trans. of Rec.)
>
> (2) "This entire policy shall be void (a) if the insured has concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof; and (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss"
>
> (Lines 44, 45 and 46, page 2 of Policies. Middle paragraph, page 13 of said Trans. of Record.)
>
> (3) "Unless otherwise provided by agreement endorsed hereon or added hereto, this entire policy

shall be void * * * (b) if the interest of the insured be other than unconditional and sole ownership''

(Lines 47, 48 and 49, page 2 of Policies. Last paragraph, bottom page 13 and top of page 14 of Trans. of Record.)

(4) "Unless otherwise provided by agreement endorsed hereon or added hereto this company shall not be liable for loss or damage occurring (a) while the hazard be materially increased by any means within the control of the insured''

(Lines 53, 54 and 55, page 2 of Policies. First six lines first paragraph, page 14 of Trans. of Record.)

(5) "Unless otherwise provided by agreement endorsed hereon or added hereto this company shall not be liable for loss or damage * * * (g) while the interest in, title to, or possession of, the subject of insurance, is changed, excepting: (1) By the death of the insured; (2) a change of occupancy of building without material increase of hazard; and (3) transfer by one or more several co-partners or co-owners to others''

(Lines 53, 54, 63, 64 and 65, page 2 of Policies. First four lines, first paragraph, page 14 and last 7 lines same paragraph top page 15 of said Trans. of Record.)

(6) "No suit or action on this policy for a recovery of any claim thereunder shall be sustainable until after full compliance by the insured with all the foregoing requirements.''

(Lines 147, 148 and 149, page 2 of Policies. Last paragraph bottom page 21 and top of page 22 of said Trans. of Record.)

At the commencement of the trial of said cause it was stipulated by the parties thereto that the following were and are facts:

(1) That each of the defendants herein at all times in the complaint stated was and is an insurance company entitled to do and doing an insurance business in the State of California under and by the laws of said state.

(Subd. (1), page 78, Trans. of Record.)

(2) That policies of insurance were issued and delivered by the defendants to plaintiff as alleged in his complaint.

(Subd. (2), page 78, Trans. of Record.)

(3) That at the time of the issuance and delivery by defendants to plaintiff of said policies of insurance he was the owner of, and in possession of, the property in said policies described, and that it was then of the value as alleged in plaintiff's complaint.

(Subd. (3), top of page 80, Trans. of Record.)

(4) That at the time of the issuance and delivery of said policies of insurance to plaintiff by the defendants he was the owner of a permit from the Prohibition Department of the United States Government for the year 1924, numbered "Calif. A62", wherein and whereby he is given the following rights:

(a) To manufacture wines for non-beverage purposes, on bonded winery premises, subject to Internal Revenue Laws;

(b) To tax-pay and remove same from said premises, only pursuant to permits to purchase Form 1410-A;

(c) To transfer the same in bond from premises to other bonded premises, only pursuant to permits to purchase Form 1410-A;

(d) To sell wines for Sacramental or other non-beverage purposes, pursuant to permits to

purchase Forms 1412 and 1410-A, in accordance with the provisions of Sections 550, 551, 552 and 553, Article 5, Regulation 60.

(Subd. (1), bottom page 81, top page 82, Trans. of Record.)

(5) That thereafter, and prior to the fire in plaintiff's complaint alleged, proceedings were instituted against him by the Prohibition Department of the United States Government wherein he was charged with selling wine in violation of the terms of said permit, from his winery at Santa Rosa, California.

(Subd. (2), page 82, Trans. of Record.)

(6) That thereafter, and on the 6th day of October, 1924, a criminal action instituted against the plaintiff by the United States Government, wherein he was charged with selling wine from his premises at Santa Rosa, was dismissed, and the bond given by the plaintiff above named in said action exonerated, and his sureties thereon discharged.

(2nd paragraph, page 83, Trans. of Record.)

(7) That while said proceedings were pending, and on the 26th day of October, 1924, a permit was issued by the Prohibition Department of the United States Government to said plaintiff for the year 1925, bearing the same number as permit for 1924, namely, "Calif. A62", and giving to said plaintiff the same rights for 1925 given and granted to him by said permit for 1924.

(Subd. (3), page 82, Trans. of Record.)

(8) That thereafter, and on the 26th day of December, 1924, an order was made and entered by the Prohibition Department of the United States Government in the proceedings instituted against plaintiff wherein he was charged with selling wine in violation of the permit held by him from the United States Government for the year 1924, in the words and figures following, to wit:

"Treasury Department,
Bureau Internal Revenue,
Form 1430-B

ORDER REVOKING PERMIT UNDER SECTION 9.

United States of America.

Northern District of California.

In the Matter of the revocation of Permit No. ....., issued to Clemente Ariasi (Permittee)) 461

To

Clemente Ariasi
(Name of Permittee)
601 Polk Street, Santa Rosa, California
(Address)

An order or citation having heretofore issued directing the above named permittee to appear and show cause why the permit issued to him should not be revoked, and such order having been returned and a due hearing held thereon, now, upon all the proceedings had herein, and due deliberation having been given thereto, it is

Ordered, that permit No. Calif. A62, issued to Clemente Airasi be, and the same hereby is, revoked and canceled upon the following grounds, set forth on the second page of this form.

Dated this 26th day of December, 1924.

S. F. Rutter
(Signature of Commissioner or Director)
Q. J. B.

Federal Prohibition Director
(Title of Officer)

I do hereby certify that on the 26th day of December, 1924, I served the foregoing notice on Clemente Ariasi at .....
by (a) delivering a copy of such notice to said

person or (b) by registered mail to such person at the address above.

(729987)

Dated this 26th day of December, 1924.

A. O'Hern

(Signature of person serving or mailing)

Note: If service be on partner or officer of corporation, state such fact.

.....

(Title of Officer)

Statement of grounds upon which permit is revoked and canceled.

For reason that it was decided at a recent hearing that you had illegally disposed of wine in violation of the terms of your permit and the National Prohibition Act, and that you illegally possessed the same".

(Subd. (4), pages 82 and 83, Trans. of Record. Pages 64 and 65 of Trans. of Record.)

(N. B. In the first paragraph on page 83 of Trans. of Record, this order is stated to be on pages 11 and 12 thereof, which is an error. It is actually on pages 64 and 65 of said transcript.)

(9) That thereafter and on the 26th day of June, 1925, a fire occurred as alleged in plaintiff's complaint, which totally destroyed the property covered by his said policies of insurance.

(Subd. (4), page 80, Trans. of Record.)

(10) That thereafter, and within the time required by plaintiff's policies of insurance, said plaintiff furnished to each of the defendants herein a proof of loss in accordance with the terms of said policies, signed and sworn to by him, wherein he states among other things as follows:

(a) That his interest in the property covered by his said policies of insurance, at the time of fire, was absolute;

(b) That the cash value of the property covered by said policies of insurance at the time

of the fire, was nineteen thousand five hundred and thirty-seven dollars and fifty cents ($19,537.50);

(c) That since the issuance of said policies there was no change in the title, use, occupation, location or possession of the property insured thereby;

(d) That the building in which the property insured was located, was occupied at the time of the fire by the plaintiff as bonded winery No. 167, and for no other purpose;

(e) That plaintiff's loss by reason of the destruction by fire of the property in said policies described, was and is the sum of nineteen thousand five hundred and thirty-seven dollars and fifty cents ($19,537.50).

(Paragraphs (a), (b), (c), (d) and (e), pages 80 and 81, Trans. of Record.)

(11) That thereafter, and on the 11th day of May, 1926, the Acting Federal Prohibition Administrator wrote to plaintiff a letter in the words and figures as follows, to wit:

"You are advised that bond Form 1538 in the sum of $5000.00 effective April 1, 1923, may be canceled as of March, 1926. This is in accordance with Departmental letter of May 4, 1926. United States Fidelity and Guaranty Company is being furnished with copy of this letter."

On the bottom of said letter there is added the following:

"This is to certify the above is a true and correct copy of a letter that was forwarded to the San Francisco office of the United States Fidelity & Guaranty Company.

(Signed) United States Fidelity & Guaranty Company,

By.....

Attorney in Fact."

(Exception II, pages 84 and 85 of Trans. of Record. Plaintiff's Exhibit No. 7.)

(12) That thereafter, and on the 5th day of January, 1927, the case of *United States v. 9365 Gallons of Wine,* being the wine referred to in the complaint as at the winery of plaintiff in Santa Rosa, was on motion of the Assistant United States Attorney dismissed.

(Exception I, page 84, Trans. of Record. Plaintiff's Exhibit No. 6.)

These facts, we respectfully submit, not only wholly fail to justify the decision of the court and the judgment made and entered thereon, but clearly show that judgment in said cause should have been made and entered therein in favor of the defendants and against the plaintiff, for the following reasons, namely:

(1) Because they show that at the time of the fire in plaintiff's complaint alleged plaintiff was not the unconditional and sole owner of the property in his policies described, while in and by each of said policies it is expressly provided that they shall be void if the insured be not such owner;

(2) Because they show that at the time of said fire plaintiff's interest in the property in said policies described was of no pecuniary value to him, while in and by said policies it is expressly provided that the company will not be liable beyond the actual cash value of the interest of the insured at the time of loss or damage;

(3) Because they show that at the time of said fire plaintiff had no insurable interest in the property in said policies described, while in and by the provisions of Section 2551 of the Civil Code of the State of California it is declared that

"The sole object of insurance is the indemnity of the insured and if he has no insurable interest the contract is void";

(4) Because they show that after the issuance and delivery to plaintiff of the policies of insur-

ance in his complaint alleged the hazard to the property in said policies described was greatly increased by means within the control of plaintiff, which increased hazard continued right up to and at the time of the fire in his said complaint referred to, while in and by each of said policies of insurance it is expressly provided that the company shall not be liable while the hazard be materially increased by any means within the control of the insured;

(5) Because they show that plaintiff was guilty of fraud and false swearing touching matters relating to his insurance and the subject thereof, while by the express terms of said policies such action upon his part avoids them;

(6) Because they show that at the time of the fire in plaintiff's complaint alleged plaintiff was in possession of the property in his policies described in violation of the National Prohibition Act, and insurance on such property under such circumstances would be void as in violation of public policy;

and we will now endeavor to show to the court that in each of these contentions we are correct, by taking each of them up separately and calling the attention of the court to the facts and the law in support thereof.

III.

AS TO THE LAW OF THE CASE.

FIRST. AS TO THE CONTENTION THAT THE EVIDENCE INTRODUCED AT THE TRIAL OF THIS CAUSE IS NOT ONLY INSUFFICIENT TO JUSTIFY THE DECISION OF THE COURT, AND THE JUDGMENT MADE AND ENTERED THEREON, BUT THAT UPON THAT EVIDENCE JUDGMENT SHOULD HAVE BEEN MADE AND ENTERED IN SAID CAUSE IN FAVOR OF THE DEFENDANTS THEREIN AND AGAINST THE PLAINTIFF.

The FIRST GROUND upon which this contention is based is, *That at the time of the fire in plaintiff's complaint alleged he was not the unconditional and sole owner of the property in his policies described, while in and by said policies it is expressly provided that they shall be void if he be not such owner.*

In and by each of the policies of insurance here involved it is provided, as we have hereinbefore stated, that:

> "Unless otherwise provided by agreement endorsed hereon or added hereto, this entire policy shall be void * * * (b) if the interest of the insured be other than unconditional and sole ownership."
>
> (See bottom of page 13, top of page 14, Trans. of Record.)

and it will be noted on examination of these policies that there is no agreement endorsed upon, or added to, either of them, in any way whatever dispensing with the necessity of a compliance with that condition.

> (Pages 9 to 24, incl., of Trans. of Record, for form of policies;
>
> Page 140 of said Trans as to stipulations with reference thereto.)

After the issuance and delivery of these policies, and prior to the fire in his complaint alleged, the permit issued to him by the Prohibition Department of the United States Government (and that he was the owner of such a permit was stipulated by attorneys for defendants in court, as will be noted on an examination of the bottom of page 81 and top of page 82 of the Trans. of Record on file herein) was cancelled and revoked by the Government on the ground, as stated in the Order of Revocation, that plaintiff had illegally disposed of wine in violation of the terms of said permit and of the National Prohibition Act, and that he was illegally in possession of wine.

(Pages 64, 65 of Trans. of Record.)

As a result of this order revoking and cancelling plaintiff's permit, plaintiff was deprived by the Government not only of the right to have, possess, use or otherwise dispose of the property in his policies described but was also deprived of *all property rights* therein under the following provisions of the National Prohibition Act, namely:

> (a) "The word 'Liquor', or the phrase 'Intoxicating Liquor', shall be construed to include * * * wine"
>
> (Sec. 1, Title 2. Prohibition Act.)
>
> (b) "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish *or possess* any intoxicating liquor, except as authorized in this Act." (The italics are ours.)
>
> (Section 3, Title 2 of Prohibition Act.)

(c) "No one shall manufacture, sell, purchase, transport or prescribe any liquor without first obtaining a permit from the Commissioner so to do."

(Section 6, Title 2 of said Act.)

(d) "It shall be unlawful *to have or possess* any liquor, or property designed for the manufacture of liquor, intended for use in violating this title, *or which has been* so used *and no property rights shall exist in any such liquor or property.*" (The italics are ours.)

(Section 25, Title 2 of said Act.)

And by Section 33, Title 2 of the same Act, it is provided that:

"The *possession of liquors* by any person not legally permitted under this title to possess liquor shall be *prima facie evidence* that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title."

Now, as unconditional ownership of property necessarily carries with it property rights in the property so owned, and the right to possess, use and otherwise dispose of such property, it would seem to conclusively follow that an owner deprived of all these rights could not be considered as an unconditional owner.

As a matter of fact, according to the overwhelming weight of authority, property *possessed* by one in violation of the provisions of the National Prohibition Act is considered in law as *"contraband"* and *"outlawed"*. The following cases on this subject, we respectfully submit, fully support us in the contention

here made, namely, that the plaintiff in this action was not at the time of the fire in his complaint alleged the sole and unconditional owner of the property in his policies described.

State v. Lee, 253 Pac. 533 (Ore.).

Here the court uses the following language in the first column, page 535:

> "Illicit mash, stills and intoxicating liquor are *contraband.* No person can hold title or ownership therein." (The italics are ours.)

U. S. v. Rykowski, 267 Fed. 866.

Here the court held that illicit mash, liquors and parts of stills that were seized under an illegal search warrant would not be returned because such property was *contraband.*

U. S. v. Kaplan, 286 Fed. 963.

Here the facts were that premises were searched without a proper search warrant, and a return was demanded by the defendant of the property seized. That demand being denied, an appeal was taken, and on the hearing of the appeal the court cited with approval the case last above referred to, and, after quoting Section 25, Title 2 of the Prohibition Act, to which we have hereinbefore referred, and Section 33, Title 2 of the same Act, to which we have also hereinbefore referred, used the following language:

> "Unless, therefore, the petition for the return of the liquor alleged to have been unlawfully seized affirmatively shows that the petitioner has a *legal permit* to have possession of the liquor, the effort is to recover possession of physical property whose possession will be criminal. There is no law requiring or justifying the return of property to anyone whose pos-

session of it will constitute a crime or whose use of it can only be for committing a crime." (The italics are ours.)

U. S. v. Vatune, 292 Fed. 497.

Here Sections 25, 26 and 33 of the National Prohibition Act were under consideration and it was held that under these Sections *no property rights existed* in liquor being transported in violation thereof; that the owner of liquor seized while being transported is not entitled to its return; that upon such owner is cast the burden of proving that his possession was lawful; that if he cannot meet that burden and show by a preponderance of the evidence that he was in the lawful possession of the property he is not entitled to its return; that, being *outlawed* by the law of the land, it will be destroyed or subjected to such disposition as the court in pursuance of Section 25 may prescribe.

U. S. v. Gartan, 4 Fed. 2nd 848.

Here it was held that under Section 25, Title 2 of the National Prohibition Act providing that no property rights shall exist in liquor or property designed for the manufacture of liquor intended to be used in violation of the act, such property, even though unlawfully seized, will not be returned to the owner.

Gallagher v. U. S., 6 Fed. 2nd 758.

Here the court used the following language:

"Section 33, Title 2 of the National Prohibition Act * * * provides that the *possession* of liquor by any person not legally permitted under the Act to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being * * * disposed of in violation of the Act. Of this liquor the warehouse was in possession *without a permit,* and the liquor was therefore presumptively being held for the purpose of violating the Act. Section

25, Title 2, provides that it shall be unlawful to have or *possess* any liquor * * * intended for use in violating the Act, and that *no property rights shall exist in any such liquor.* This liquor in question being prima facie so intended was unlawfully *possessed* by the warehouse and neither Gallagher nor anyone else could have any property rights in it." (The italics are ours.)

In this case the liquor in question was unlawfully seized and demand was made for its return, which demand was denied for the reasons stated in the decision.

Potter v. Geraghty, 47 Sup. Ct. Rep. 235,

reverses the judgment rendered in the case of *Geraghty v. Potter,* reported in the 5th Fed. 2nd, 366, where it was held that liquor unlawfully seized should be returned to the owner; and in said judgment of reversal the court ordered the liquor to be destroyed.

Gonch v. Republic Storage Company, 48 Sup. Ct. Rep. 140.

Here the Supreme Court of the United States in effect affirmed the judgment of the Court of Appeals in New York, reported in a case of the same name in the 157th N. E. 136, where it was held that no property rights existed in any property *possessed* in violation of the National Prohibition Act.

This action was originally instituted by Gonch against the Republic Storage Company in the State of New York for the purpose of recovering the sum of $12,193.00 damages for the non-delivery by that company to plaintiff of 27 barrels of whiskey alleged to have been the property of the plaintiff and to have been stored by plaintiff in a bonded warehouse maintained by defendant. It was contended that defendant had not exercised proper care, and that by reason thereof this

whiskey was stolen from him. Defendant denied ownership on the part of the plaintiff, and on that denial the case went to trial. At the conclusion of plaintiff's case, and again at the conclusion of the entire trial, defendant moved to dismiss the action on the ground that the plaintiff had not proven sufficient facts to constitute a cause of action against him. The decision on these motions was withheld by the court, and the case was submitted to the jury, which rendered a verdict in favor of plaintiff and against the defendant for the sum of $7660.64. Defendant moved for a directed verdict and also to set aside the verdict. Both of these motions were denied, and judgment on the verdict was entered accordingly. It was contended by the defendant that *no property rights* existed in the plaintiff in the whiskey in question because of the fact that he failed to show he had any *permit* therefor from the Government. As to this contention the court used the following language:

> "The clauses of the Federal Statute * * * declaring that liquor is not property are to be regarded as police regulations inserted for the purpose of protecting the Government officers in the exercise of their duties, but as between private persons there may be property in liquor despite these provisions until the Government has taken proceedings to confiscate it."

This case is reported in the 211 *N. Y. S.* 433.

From that decision an appeal was taken to the Supreme Court, Appellate Division, and the report thereof will be found in 219 *N. Y. S.* 46. By that court the judgment was affirmed.

From this last decision an appeal was taken to the Court of Appeals and the decision of that court will be found in 157 *N. E.* 136. That court reversed the judgment of the Supreme Court, Appellate Division, and in so doing used the following language:

> "Plaintiff suffered no loss or injury to a lawful right, and, therefore, is entitled to no damage. The whiskey had no pecuniary value as to him. Indeed, it had intrinsic value and this could be the subject of larceny * * * but it was as worthless to plaintiff as a gem in the sea. The National Prohibition Act * * * deprived him of any property in it, and forbade him to possess, transport, use or sell it * * * He cannot, therefore, lawfully have or possess the whiskey, for it had been used in violation of the Statute and no property rights existed in it * * * The judgment of the Appellate Division and that of the trial term should be reversed and the complaint dismissed with costs in all cases."
>
> From this decision a petition was made to the Supreme Court of the United States on a Writ of Certiorari, which petition was denied on the 28th day of November, 1927, as shown in *Gonch v. Republic Storage Company,* 48 Sup. Ct. Rep. 140.

Under these authorities, we respectfully submit that on the admitted facts in this case it clearly appears that the defendant in error was not, at the time of the fire in his complaint alleged, the unconditional and sole owner of the property in his policies of insurance described, and that, therefore, under the express terms of said policies he is precluded from recovering in this action.

It was contended by the defendant in error, however, at the trial of this case, and is still contended by him, that he was lawfully in possession of the property in his policies described under and by virtue of a permit issued to him by the Prohibition Department of the United States Government for the year 1925; and, defendants having offered in evidence the

order of revocation dated the 26th day of December, 1924, a copy of which appears on pages 64 and 65 of the Transcript of Record on file herein, plaintiff then offered in rebuttal, and there was admitted in evidence by the court, over the objections of the defendants, evidence as follows:

> (1) That on the 6th day of October, 1924, a criminal action instituted against plaintiff by the United States Government, wherein he was charged with selling wine on his premises in Santa Rosa, was dismissed;
>
> (Page 83, Trans. of Record.)
>
> (2) That on the 5th day of January, 1927, an action instituted by the United States Government against 9365 gallons of wine, being the wine insured in and by the policies of insurance in plaintiff's complaint referred to, was dismissed;
>
> (Page 84, Trans. of Record.)
>
> (3) That on the 11th day of May, 1926, a bond in the sum of $5000.00, given by plaintiff in some matter, the nature and character of which was not shown on the trial of said cause, was cancelled by the Government as of March, 1926.
>
> (Page 84, Trans. of Record.)

As to the dismissal of the criminal action against plaintiff, it will be noted that said action was dismissed on the 6th day of October, 1924, while the order of the Government revoking his permit is dated December 26th, 1924, nearly three months thereafter (see pages 64 and 65, Trans. of Record), and such being the case that dismissal could by no possibility in any way affect an order of revocation made nearly three months thereafter.

As to the dismissal of the 5th of January, 1927, of an action instituted by the Government against the

wine covered by plaintiff's policies, while there was nothing introduced in evidence as to the character of that action, it would appear that it was a suit brought for the purpose of confiscating this wine, and, as said wine was destroyed by fire on the 26th day of June, 1925 (see paragraph IV of complaint, page 7 of Trans. of Record), it is at least reasonable to presume that the dismissal was because the property having been destroyed nothing could be gained by proceeding with the action. That, surely, could in no way whatever have any effect of any kind or character, either upon plaintiff's permit for 1925 or upon the Order of Revocation of December 26th, 1924.

As to the cancellation of bond for $5000.00,—inasmuch as plaintiff offered nothing whatever which shows or tends to show any relation between that cancellation and his permit for 1925, or between it and the Order of Revocation of December 26th, 1924, it would seem somewhat difficult to understand how the cancellation of that bond could in any way whatever affect plaintiff's permit or said Order of Revocation.

As to the permit itself for the year 1925, under which plaintiff claims he was lawfully in possession of the property covered by his policies of insurance, the undisputed facts are as follows:

> (1) Prior to the 26th day of December, 1924, on which last named date the Prohibition Department of the United States Government issued the Order of Revocation which appears on pages 64 and 65 of the Transcript of Record on file herein, that Department issued to plaintiff a permit for the year 1925, numbered "Calif. A62" (the same number as his permit for 1924), wherein and

whereby he was given the same rights, covering the same property, at the same location, described in his permit for the year 1924.

(See paragraph 3, page 82 of Trans. of Record.)

(2) At the time this permit for 1925 was given to plaintiff, it will be noted by an examination of the Order of Revocation above referred to, charges were pending against him before the Prohibition Department of the Government to the effect that he had illegally disposed of wine in violation of the terms of his permit, and the National Prohibition Act, which charges were found by said Department to be true, as shown in said order; and, because of that fact, "Permit No. Calif. A62" was revoked and cancelled.

(3) At the time of the issuance of this permit for 1925, there existed as a part of the National Prohibition Act, and still exists, Section 6, Title 2, wherein it is provided that:

> "No permit shall be issued to any person who within one year prior to the application therefor, or issuance thereof, shall have violated the terms of any permit issued under this title, or any law of the United States, or of any State, regulating traffic in liquor."

(4) As shown by said Order of Revocation, which is dated December 26th, 1924, plaintiff *had violated* the terms of his permit for 1924 within one year prior to his application for the permit of 1925, and *had violated* the Prohibition Law within one year prior to the issuance to him of that permit, and, therefore, any permit issued to him for 1925 under such circumstances was absolutely void from its inception as being in direct violation of Section 6, Title 2 of the Prohibiton Act above referred to; and, as it will not be presumed that any Officer of the Prohibition Department of the United States Government wilfully and deliberately issued a permit to plaintiff in violation of the law, it would seem conclusive that this permit was in some unaccountable way inad-

vertently issued by someone who either overlooked, or did not know at the time of its issuance, that charges were pending against plaintiff for the violation of his permit for 1924.

(5) But, even assuming that plaintiff's permit for 1925 was intentionally issued to him prior to the Order of Revocation dated December 26, 1924, that Order revokes *"Permit No. Calif. A62 issued to Clemente Ariasi"*, and that is the number of the permit of said plaintiff for the year 1925.

In view of the fact that said Order of Revocation is dated December 26, 1924, and that, if it referred only to the permit of plaintiff for 1924, plaintiff would within five days after that order be permitted to do the very thing that the Order of Revocation precluded him from doing, it would seem at least reasonable to presume that by that order any permit numbered Calif. A62 which plaintiff had, whether for 1924 or for 1925, which had prior to that Order been issued to him and was then in force, was by said Order cancelled and annulled.

We respectfully, submit therefore, that plaintiff being without any valid permit from the Government at the time of the fire complained of, he was not, at that time the unconditional and sole owner of the property described in the policies of insurance in his complaint referred to.

The SECOND GROUND, upon which it is contended that the evidence introduced at the trial of said cause is not only insufficient to justify the decision of the court and the judgment made and entered thereon, but that upon that evidence judgment should have been made and entered in said cause in favor of the defendants therein and against the plaintiff, is:

That at the time of the fire in plaintiff's complaint alleged the property covered by his policies of insurance were of no pecuniary value to him, while in and by said policies it is expressly provided that the company will not be liable beyond the actual cash value of the interest of the insured in the property at the time of loss or damage.

In each of the policies of insurance involved in this action it is provided that:

> "The company will not be liable beyond the actual cash value of the interest of the insured in the property at the time of loss or damage"
>
> (See first three lines, page 11 of Trans of Record on file herein);

and that the property in said policies described was of no cash value to plaintiff at the time of said fire, we respectively submit, is conclusively established by the following provisions of the National Prohibition Act, namely:

> (a-1) "The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include 'wine';"
>
> (Sec. 1, Title 2 of said Act.)

> (a-2) "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect manufacture, sell, barter, transport, export, deliver, furnish or *possess* any intoxicating liquor, except as authorized in this Act;"
>
> (Sec. 3, Title 2 of said Act.)

> (a-3) "No one shall manufacture, sell, purchase, transport or prescribe any liquor without first obtaining a permit from the Commissioner;"
>
> (Sec. 6, Title 2 of said Act.)

(a-4) "It shall be unlawful to have or *possess* any liquor or property designed for the manufacture of liquor intended for use in violation of this title, or which has been so used, and no property rights shall exist in any such liquor or property;"

(Sec. 25, Title 2 of said Act.)

and in and by Section 33, Title 2 of the same Act, it is further provided that:

"The possession by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title."

Now, keeping in mind the facts, as we have hereinbefore shown, that at the time of the fire in plaintiff's complaint alleged he was in possession of the property in his policies of insurance described without any permit from the Government; that his permit from the Government affecting that property had been revoked and cancelled by the proper authorities of the Prohibition Department of the Government for the reason, as stated in the Order of Revocation, that he had illegally disposed of wine in violation of the terms of said permit and the National Prohibition Act,—keeping these facts in mind it can be seen at a glance, when they are viewed in the light of Section 33 above quoted, that at the time of the fire in plaintiff's complaint alleged plaintiff was in possession of the property in his complaint described not only in violation of law but with a view to still further violating the law by selling, bartering, exchanging, giving away, furnishing or otherwise disposing of said property.

Such possession, as we have shown on page 16 hereof, not only deprived plaintiff of any property rights in said property but made it *"contraband"* and *"outlawed"*, under the authorities to which the court's attention has already been directed, and of no pecuniary value whatever to him. As stated by the court in *Gonch vs. Republic Storage Company,* referred to on page 18 hereof, "the plaintiff suffered no loss or injury to a lawful property right and, therefore, is entitled to no damage. The whiskey had no pecuniary value to him * * *. It was as worthless to plaintiff as a gem in the sea". We respectfully submit, therefore, that the property in plaintiff's policies described was of absolutely no pecuniary value to him at the time of the fire in his complaint alleged and that, as the defendants herein are by the express terms of said policies of insurance liable to him only for the actual cash value of his interest in said property at the time of its destruction by fire, no liability whatever exists in his favor from the defendants herein, or from either of them.

The THIRD GROUND upon which it is claimed that the evidence introduced at the trial of said cause was not only insufficient to justify the decision of the court and the judgment made and entered thereon but that upon said evidence judgment should have been made and entered in favor of the defendants and against the plaintiff, is *that at the time of the fire in plaintiff's complaint alleged he had no insurable interest in the property in his policies described and that because of that fact no liability exists in his favor as against the defendants under said policies.*

By Section 2551 of the Civil Code of the State of California, it is provided that: "The sole object of insurance is the indemnity of the insured and if he has no insurable interest the contract is void".

An insurable interest is defined by Section 2546 of the same Code as follows: "Every interest in property or in relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest."

It is also further provided by Section 2550 of the same Code that: "The measure of an insurable interest in property is the extent to which the insured might be damnified by loss or injury thereto".

In determining, therefore, whether or not the plaintiff in this action had any insurable interest in the property insured at the time of the fire in his complaint alleged, the question to be answered is *"was plaintiff damnified by the destruction by fire of the property in his policies of insurance described"?*

The answer to this question is given by the court in *Gonch v. Republic Storage Company,* 157 N. E. 136, which case, as we have hereinbefore shown, was in effect affirmed by the Supreme Court of the United States in 48 Sup. Ct. Rep. 140. For a history of that case, and of the law as established thereby, we would respectfully refer the court to pages 18 to 20 hereof.

As we have already shown, plaintiff had no right to sell or otherwise dispose of, or even possess the property in his policies of insurance described (Section 3, Title 2, and Section 25, Title 2, National Prohibition Act); and this last section it will be noted applies not only to property *intended for use* in

violating the Prohibition Act but also property which *had been used* for that purpose,—and, in the order revoking plaintiff's permit, it is expressly stated that said permit was cancelled because plaintiff *had* illegally disposed of wine in violation of his permit and the National Prohibition Act.

In other words, the followng are facts as to which there can not be any dispute:

(a) That the property in plaintiff's policies of insurance described is property that is subject to the provisions of the National Prohibition Act.

(Sec. 1, Title 2 of said Act.)

(b) That plaintiff had no right to possess, use or otherwise dispose of that property without a permit from the Prohibition Department of the United States Government authorizing him so to do.

(Sec. 3, Title 2; Sec. 6, Title 2 of said Act.)

(c) That the permit issued to plaintiff by the Government referring to said property was revoked for the reasons as stated therein that he had illegally disposed of wine in violation of said permit and of the National Prohibition Act.

(Order of Revocation, pages 64 and 65 of Trans. of Record.)

(d) That in and by the Prohibition Act it is provided that no property rights shall exist in any property used or intended for use in violation of law.

(Sec. 25, Title 2 of Prohibition Act.)

(e) That in and by said Prohibition Act it is further provided that possession of such property by one not legally permitted is prima facie evidence that such property is kept for the purpose of violating the law.

(Sec. 33, Title 2 of said Prohibition Act.)

In view of these facts it would seem conclusive that the property covered by plaintiff's policies of insurance was of absolutely no value whatever to him at the time of the fire in his complaint alleged and that, therefore, he was in no way damnified by that fire, and because of that fact had no insurable interest in said property at the time it was destroyed.

The FOURTH GROUND, upon which it is claimed that the evidence was and is insufficient to justify the decision of the court and the judgment made and entered thereon and that upon said evidence judgment should have been made and entered in said cause in favor of the defendants therein and against the plaintiff, is *that the hazard to the property covered by plaintiff's policies of insurance was greatly increased by means within his control, after the issuance and delivery to him of said policies and prior to the fire in his complaint alleged, which increased hazard continued right up to and at the time of said fire, and that because of that fact no recovery can be had by him under said policies.*

As we have already shown by what is hereinbefore stated, the following facts are absolutely undisputable:

(a) That plaintiff was not the unconditional and sole owner of the property in his policies described at the time of the fire in his complaint alleged;

(b) That his possession of said property was illegal and by reason thereof he was deprived of the right to sell, use, possess or otherwise dispose of it and of all property rights therein;

(c) That it was of absolutely no pecuniary value to him.

Because of these facts he would unquestionably be greatly benefited by the destruction of this property by fire if he could collect on his insurance policies. This, it would seem, shows beyond question that the hazard to the property in said policies described was greatly increased after their issuance to plaintiff, and that said increased hazard continued right up to and at the time of the fire in his complaint alleged.

At the time these policies were issued to plaintiff, he was, as shown in paragraph (1) and its subdivisions at the bottom of page 81 and the top of page 82 of the Transcript of the Record on file herein, the owner of a permit from the United States Government relating to the property in said policies described, and because thereof said property was of an actual cash value to him. Had a fire occurred during the time that permit was in force, unquestionably plaintiff would have suffered a loss which would entitle him to recover under said policies. But, by the revocation of said permit, a great change occurred in plaintiff's rights with reference to said property. Property which before was of large value, immediately became and was of no value whatever. Before that revocation it was to the interest of plaintiff to protect the property covered by his policies of insurance, for, as shown by the allegations in plaintiff's complaint, it was of a value greatly in excess of the amount of said insurance, while after that revocation it was of no value whatever to plaintiff, and, therefore, it would be greatly to his interests to have it destroyed by fire if he could collect on his policies.

The revocation of that permit was brought about by means within the control of plaintiff. In other words, had plaintiff not violated the terms thereof, and of the Prohibition Act, and had said Order of Revocation not been made, the hazard to the property in plaintiff's policies described would not have been increased.

The hazard to the property in said policies described was therefore greatly increased by means within the control of the plaintiff, and, it being expressly provided in his policies that they should be void in such case, no recovery should be permitted to plaintiff in this action.

The FIFTH GROUND, upon which it is contended that the evidence was and is insufficient to justify the decision of the court and the judgment made and entered thereon and that upon said evidence judgment should have been made and entered in said cause in favor of the defendants therein and against the plaintiff, is *that plaintiff was guilty of fraud and false swearing which precludes him from recovering under said policies.*

In and by each of the proofs of loss furnished by plaintiff to defendants, claim is made by said plaintiff against defendants for the full amount of his insurance. (See plaintiff's Exhibits 3 and 4 on file herein.) In each of these proofs of loss plaintiff states that his interest in the property covered by his policies at the time of the fire was absolute; that the cash value of said property at that time was $19,537.50; that since the issue of said policies there was no change in the title, use, occupation, location or possession of the property insured thereby; that the building in which

the property insured was located was occupied at the time of the fire as a bonded winery and for no other purpose; and that plaintiff's loss by said fire was the sum of $19,537.50,—and plaintiff claimed from the defendants the full amount of his insurance.

This claim was made notwithstanding the fact that plaintiff knew that he was not entitled to the full amount of that insurance, or any thereof, for the reason that he knew: that at the time of the fire complained of he was without any permit from the United States Government to make, sell, use, possess or otherwise dispose of the property or any part thereof in his policies described; that there had been a change in his title, use, occupation and possession of that property which was caused by the order revoking his permit; that by reason of such revocation no property rights in said property existed in plaintiff; and that said property was not being held by plaintiff in a bonded warehouse in accordance with the rules of the Prohibition Department.

In fact, at the time of the fire, as shown by the evidence introduced on the part of plaintiff at the trial of said cause (see Exhibit 1, page 84 of Transcript), there was pending an action by the United States Government against the wine covered by plaintiff's policies of insurance, which action was not dismissed until over a year after said wine was destroyed by the fire in plaintiff's complaint alleged.

These facts were all within the knowledge of the plaintiff at the time he furnished to defendants the proofs of loss referred to and at the time he made the statements under oath that are therein contained,

which clearly shows that the plaintiff in this action (the defendant in error herein) wilfully and deliberately swore falsely for the purpose of inducing the defendants herein (the plaintiffs in error herein) to pay to him a sum of money which he well knew he was not entitled to.

The SIXTH GROUND, upon which it is contended the evidence introduced on the trial of said cause is not only insufficient to justify the decision of the court and the judgment made and entered thereon but that upon said evidence judgment should have been made and entered in said cause in favor of the defendants therein and against the plaintiff, is *that at the time of the fire in plaintiff's complaint alleged he was in possession of the property in his policies described, in violation of the National Prohibition Act, and insurance on said property protecting him against loss thereby by fire under such circumstances would be void as in violation of public policy.*

It is a principle of law relating to insurance, to which we believe there is no exception, that a risk assumed by an insurance company must be a legal one, and not repugnant to public policy nor positive prohibition (Section 43, Vol. 1, *Joyce on Insurance,* bottom of page 205 and top of page 206); and that it is against public policy to allow one to possess liquors in violation of the National Prohibition Act, it would seem is so conclusive as to not admit of dispute, for, by Section 3, Title 2 of that act, it is expressly provided that

> "No person shall on or before the date when the Eighteenth Amendment to the Constitution of

> the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or *possess* any intoxicating liquor except as authorized in this Act."

And, by Section 6, Title 2 of the same Act, the authorization provided for is in the form of a *permit* from the Prohibition Commissioner. And, in Section 25, Title 2 of said Act, it is provided that

> "It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property."

This last section it will be noted covers not only *liquor* but property *designed for the manufacture of liquor,* and includes not only property *intended* to be used in violating the Prohibition Act but also property which *has been so used,* and then expressly provides that no property rights shall exist in such property, that is *first,* in liquor; *second,* in property designed for the manufacture of liquor; *third,* in property intended for use in violation of the law; and *fourth,* in property which had been used for violation of the law.

This, we respectfully submit, very clearly covers the property described in plaintiff's policies of insurance.

Now, keeping in mind the undisputed fact that the permit issued to plaintiff by the Prohibition Department of the United States Government authorizing him to have, possess and dispose of the property in his policies described was cancelled and revoked by the Government on a hearing given to plaintiff after

the issuance of his policies of insurance, and prior to the time of the fire in his complaint alleged, it is plainly to be seen that that property in effect became and was *contraband* and *outlawed* at the time of the fire, under all the authorities referred to on pages 13 to 20 hereof.

We respectfully submit, therefore, that, in the light of the undisputed facts, and of the law applicable thereto, the policies here sued upon are void because against public policy, as their only object could be to protect the plaintiff in the possession of property which was and is contraband and outlawed, and in the possessing and using of which plaintiff was violating the law.

While it is true that it is held in

Erb v. German American Ins. Co., 67 N. W. 583 (Iowa); and

Insurance Co. v. Evans, 68 Pac. 623 (Kans.),

that insurance on a stock of *drugs,* including liquors, was valid and could be enforced because of the fact that such liquors could be put to a lawful use, that condition does not exist here by reason of the revocation of plaintiff's permit. By reason of that revocation, and the law applicable thereto to which we have referred, *any use to which plaintiff might put the property insured would be illegal.*

Erb v. Ger. Am. Ins. Co., 67 N. W. 583 (Iowa) and see particularly first column, page 585, where it is stated that where the purpose of the contract is to protect one in an illegal business, it is void.

Ins. Co. v. Evans, 68 Pac. 623 (Kans.)

where it is held to the same effect.

In other words, the things to be kept in mind in determining whether or not these policies are void as against public policy because of action on the part of the plaintiff after they were issued, and without any knowledge or consent on the part of the defendants, are these:

(1) That the possession of said property by plaintiff at the time of the fire in his complaint alleged was absolutely illegal under the provisions of the National Prohibition Act to which we have hereinbefore referred;

(2) That under Section 33, Title 2 of that act, his *possession was presumed to be for the purpose of violating said Act;* and

(3) That there was no use of any kind or character to which plaintiff could put that property without violating the law.

That, under such circumstances, the policies sued upon were and are absolutely void and of no effect, as being in violation of public policy, we believe, is beyond question.

For each and all of the reasons, therefore, which are hereinbefore referred to, defendants respectfully submit that the evidence was and is insufficient to justify the decision of the court.

IV.

THAT THE DECISION OF THE COURT IS AGAINST LAW.

We respectfully submit that the decision of the court was and is against law (1) for the reasons hereinbefore set forth and stated that it is not only not sustained by the evidence but is in direct opposition

thereto; and (2) that the conclusions of law found by the court, are not sustained by its findings, in that the court finds as a fact that plaintiff had no permit (see lines 2-9 and 10, page 55, Trans. of Record) and it necessarily follows that the decision of the court, being based upon that finding, is against law.

V.

ERRORS OF LAW OCCURRING AT THE TRIAL OF SAID CAUSE.

After defendants had admitted virtually all the facts alleged by plaintiff in his complaint, except—

(1) That he was the unconditional and sole owner of the property insured at the time of its destruction by fire;

(2) That the interest of plaintiff in said property at the time of such destruction was of any value;

(3) That plaintiff suffered any loss by reason of said fire.

They then introduced in evidence an order of the Prohibition Department of the United States Government revoking the permit which had theretofore been issued to plaintiff by said Department entitling him to possess, use and dispose of the property in his policies described, in which order of revocation it is stated that said permit was revoked because of the violation by said plaintiff of the terms of said permit and of the provisions of the National Prohibition Act. (See Order of Revocation, pages 64 and 65 of Trans. of Record.)

Thereupon, defendant in error was permitted by the court to introduce, over the objection of the plaintiffs in error, evidence as follows, to wit:

(1) That on the 6th day of October, 1924, an information charging plaintiff in the case of United States v. Clemente Ariasi with selling wine from his winery in Santa Rosa, was dismissed, his bond in said case exonerated, and his sureties thereon released.

(See page 83 of Trans. of Record.)

(2) That the case of United States v. 9365 gallons of wine, being the wine of the defendant in error in his winery at Santa Rosa, was dismissed on the 5th day of January, 1927.

(See page 84 of Trans. of Record.)

(3) That on the 11th day of May, 1926, the Prohibition Department of the United States Government notified plaintiff that a certain bond given by him (the nature and character of which he made no attempt to show), effective April 1, 1923, was cancelled as of March, 1926, and that the sureties on said bond were informed of that fact.

(See pages 84 and 85 of Trans. of Record.)

Thereafter, the case was argued by the respective parties and submitted to the court for decision and, after being considered by the court, said court made and entered its decision in favor of the defendant in error and against the plaintiffs in error as prayed for in the complaint on file herein. (See page 85 of Trans. of Record.)

Thereafter, the court signed and filed the findings of fact and conclusions of law presented to it by the defendant in error and refused to sign or file the find-

ings of fact presented to it by the plaintiffs in error. (See page 111 of Trans. of Record.)

Upon the findings of fact and conclusions of law so signed and filed by the court, judgment was made and entered in said cause in favor of the plaintiff therein and against the defendants therein as in the complaint prayed for. (See pages 58 and 59 of Trans. of Record.)

Plaintiffs in error, believing that error was committed by the trial court for which the judgment made and entered against them should be reversed, now respectfully call the attention of the court to the eighteen assignments of error which appear on pages 130 to 136, inclusive, of the Trans. of Record on file herein, and to the exceptions taken by said plaintiffs in error as to each of them, and to the facts and the law upon which they rely in support of the validity of each of said exceptions.

Exception No. I. (First Assignment of Error.)

This is directed to the overruling by the court of the objection made by defendants to the admission in evidence as rebuttal on the part of the plaintiff, the fact that on the 6th day of October, 1924, a criminal action instituted by the United States Government against plaintiff for violation of the National Prohibition Act for selling wine upon his premises in Santa Rosa was dismissed. (See pages 83 and 84 of Trans. of Record.)

That in overruling this objection made by the plaintiffs in error the court committed error, we believe is a

matter that can be seen at a glance when it is noted that that dismissal was made nearly three months prior to the making of said order. From this it would appear conclusive that it was and is absolutely impossible for that dismissal to have any effect upon, or to in any way relate to, that order as it was not in existence at the time said dismissal was made. We respectfully submit, therefore, that the court committed error in overruling the objection to which this exception refers.

Exception No. II. (Second Assignment of Error.)

This is directed to the overruling by the court of the objection made by defendants to the admission in evidence as rebuttal on the part of plaintiff, the fact that on the 5th day of January, 1927, the case of the *United States v. 9365 gallons of wine* (being the same wine referred to in the winery of plaintiff at Santa Rosa) was dismissed. (See page 84 of Trans. of Record.)

This wine, it will be noted, is the same wine described in plaintiff's policies of insurance, which wine was destroyed by fire on the 26th day of June, 1925, nearly two years prior to the dismissal of that action. That action it will be noted, on examination of Finding No. 3 of the Court, (see page 55 of the Transcript) was a libel proceeding instituted by the Government against the wine owned by the plaintiff and insured by the defendants. While there was no evidence of any kind or character introduced at the trial of said cause by the plaintiff showing the reason for this dismissal, it needs no discernment to see that the

reason therefor was because the property affected by that action had been destroyed by fire, and that, therefore, nothing could be gained by continuing that action in force. That dismissal, therefore, we respectfully submit, could not by any possibility have any effect upon the order revoking plaintiff's permit, and we respectfully submit that in overruling the objection made to that evidence the court committed error.

Exception No. III. (Third Assignment of Error.)

This is directed to the overruling by the court of the objection made by the defendants to the admission in evidence of rebuttal on the part of the plaintiff of a letter written to plaintiff by the Acting Federal Prohibition Commissioner dated May 11th, 1926, wherein a bond in the sum of $5,000.00, effective April 1, 1923, was cancelled as of March, 1926. (See pages 84 and 85 of Trans. of Record.)

No evidence of any kind or character was offered on the part of plaintiff to show the nature or character of this bond, or for what purpose it was given, or that it in any way related to any of the matters, facts or things involved in this action. Also, it appears that said bond was cancelled nearly a year after the fire in plaintiff's complaint alleged. In what way or manner the cancellation of that bond coud have any effect whatever on the order revoking plaintiff's permit, we are unable to understand, and we respectfully submit that the court erred in admitting that letter in evidence.

Exception No. IV. (Fourth Assignment of Error.)

This is directed to the decision rendered by the court in said action in favor of the plaintiff therein and against the defendants, it being contended on the part of the plaintiffs in error that the evidence introduced at the trial of said cause was not only insufficient to justify said decision but that upon that evidence the decision of the court should have been in favor of the defendants therein and against the plaintiff. (See page 85 of Trans. of Record.)

In support of the contention of plaintiffs in error that the court erred in rendering its decision herein in favor of plaintiff and against the defendants, we respectfully refer the court to everything stated herein in support of the contentions of said appellants which appear on pages 12 to 37 hereof; and we respectfully submit that upon the facts and the law as therein shown the court committed error in rendering its decision.

Exception No. V. (Fifth Assignment of Error.)

This is directed to the signing by the court of the findings of fact and conclusions of law signed and filed by it in said cause, and its refusal to sign and file those presented to it by plaintiffs in error, it being contended that they are not supported by the evidence introduced on the trial of said cause and that the facts should have been found by the court as shown in the findings of fact submitted to it by the defendants. (See pages 85 to 111 inclusive of Trans. of Record.)

In support of this objection, plaintiffs in error relied upon the same facts relied upon by them in

support of the validity of the Exception numbered IV above referred to, and we respectfully submit that these facts show that the court committed error in signing and filing the findings of fact and conclusions of law actually signed and filed by it.

Exception No. VI. (Sixth Assignment of Error.)

This is directed to the finding by the court in Finding No. I that the property in plaintiff's policies of insurance described continued to be of the value of $19,537.50 up to and at the time of the fire in plaintiff's complaint alleged. (See pages 111 to 113, inclusive, Trans. of Record.)

In support of the contention of the plaintiffs in error that the evidence introduced at the trial of this cause was and is insufficient to justify this finding and that the court erred in so finding, we respectfully refer the court to what is stated on pages 25 to 27 hereof, inclusive.

Exception No. VII. (Seventh Assignment of Error.)

This is directed to the finding by the court in Finding No. I that at the time of the fire in plaintiff's complaint alleged he was the owner of the property in said policies described. (See pages 113 and 114, Trans. of Record.)

In support of the contention of plaintiffs in error that the evidence introduced at the trial of this cause was and is insufficient to justify that finding, and that the court committed error in so finding, we respectfully refer the court to what is stated on pages 13 to 24, inclusive, hereof.

Exception No. VIII. (Eighth Assignment of Error.)

This is directed to the finding by the court in Finding No. I that plaintiff suffered a loss because of the fire in his complaint alleged in excess of $5,000.00, namely in the sum of $19,537.50, and that the actual cash value of the interest of the plaintiff in property in his policies described at the time of such loss was in excess of $5,000.00. (See pages 114, 115, Trans. of Record.)

In support of the contention of plaintiffs in error that the evidence introduced at the trial of said cause was and is insufficient to justify this finding and that the court committed error in so finding, we respectfully refer the court to what is stated on pages 25 to 27, inclusive, hereof.

Exception No. IX. (Ninth Assignment of Error.)

This is directed to the finding by the court that at the time of the commencement of this action, and at the time of the trial thereof, there was due, owing and unpaid from the defendant Orient Insurance Company to the plaintiff the sum of $5000.00. (See pages 115, 116 of Trans. of Record.)

In support of the contention of plaintiffs in error that the evidence introduced on the trial of this cause was and is insufficient to justify this finding, and that the court committed error in so finding, we respectfully refer the court to what is stated on pages 13 to 37, inclusive, hereof.

Exception No. X. (Tenth Assignment of Error.)

This is directed to the finding by the court that the property in plaintiff's policies of insurance described

continued to be of the value of $19,537.50 up to and at the time of its destruction by the fire in plaintiff's complaint alleged. (See pages 116, 117 of Trans. of Record.)

In support of the contention of the plaintiffs in error that the evidence introduced at the trial of this case was and is insufficient to justify this finding, and that the court committed error in so finding, we respectfully refer the court to what is stated on pages 13 to 24, inclusive, hereof.

Exception No. XI. (Eleventh Assignment of Error.)

This is directed to the finding by the court that the plaintiff was the owner of the property in his policies described at the time of the fire in his complaint alleged. (See pages 117, 118 of Trans. of Record.)

In support of the contention of plaintiffs in error that the evidence introduced at the trial of said cause was and is insufficient to justify this finding, and that the court erred in so finding, we respectfully refer the court to what is stated on pages 13 to 24 hereof, inclusive.

Exception No. XII. (Twelfth Assignment of Error.)

This is directed to the finding by the court that plaintiffs' loss at the time of the fire in his complaint alleged was in excess of $1500.00, namely the sum of $19,537.50, and that the actual cash value of the interest of plaintiff in the property in his policies described at the time of such loss was in excess of $1500.00. (See pages 118, 119, Trans. of Record.)

In support of the contention of the plaintiffs in error that the evidence introduced at the trial of this

cause was and is insufficient to justify this finding, and that the court erred in so finding, we respectfully refer the court to what is stated on pages 13 to 24, inclusive, hereof.

Exception No. XIII. (Thirteenth Assignment of Error.)

This is directed to the finding by the court that the sum of $1500.00 is due, owing and unpaid to plaintiff from the defendant Employers' Fire Insurance Company. (See pages 119, 120, Trans. of Record.)

In support of the contention of plaintiffs in error that the evidence introduced at the trial of said cause was and is insufficient to justify this finding, and that the court erred in so finding, we respectfully refer the court to what is stated on pages 13 to 37, inclusive, hereof.

Exception No. XIV. (Fourteenth Assignment of Error.)

This is directed to the finding by the court that criminal proceedings instituted by the United States Government against the plaintiff were dismissed on the 6th day of October, 1924, and that the libel proceedings instituted by the Government against the said plaintiff as to the wine owned by him in Santa Rosa were dismissed on the 5th day of January, 1927, and that no forfeiture of said wine was made by the Government. (See pages 120, 121 of Trans. of Record.)

While this finding does receive support in the evidence introduced at the trial of said cause, such evidence was and is absolutely incompetent, irrelevant

and immaterial for any purpose whatever for the reasons—

(1) That the dismissal of said criminal proceedings against plaintiff was nearly three months prior to the order revoking his permit and, therefore, such dismissal cannot by any possibility have any effect upon said order, it not at that time being in existence; and

(2) That the dismissal of the libel proceedings instituted against the wine of the plaintiff in his policies described was made long after that wine had been destroyed by the fire in his complaint alleged and, therefore, that dismissal in no way whatever operated to prove or even tended to prove that said wine would not have been confiscated by the Government in that action had it not been destroyed by fire.

Exception No. XV. (Fifteenth Assignment of Error.)

This is directed to the finding by the court that plaintiff was not guilty of any fraud or false swearing touching any matter relating to his insurance or the subject thereof. (See pages 121, 122 of Trans. of Record.)

In support of the contention of plaintiffs in error that the evidence introduced at the trial of this case was and is insufficient to justify that finding, and that the court erred in so finding, we respectfully refer the court to what is stated on pages 32 to 34 hereof, inclusive.

Exception No. XVI. (Sixteenth Assignment of Error.)

This is directed to the conclusion of law made by the court that plaintiff is entitled to judgment against the defendant Orient Insurance Company in the sum of $5,000.00 and interest. (See pages 122, 123 of Trans. of Record.)

In support of the contention of plaintiffs in error that the evidence introduced at the trial of this cause was and is insufficient to justify this conclusion, and that in making the same the court committed error, we respectfully refer the court to what is stated on pages 13 to 37 hereof, inclusive; and also to the further fact that the trial court in its finding No. 2 finds as a fact that plaintiff's permit from the Government with reference to the property in his complaint described *was revoked by the Federal Prohibition Commissioner of the United States Government on the 26th day of December, 1924.* (See finding No. 3, page 87 of Trans. of Record.)

Exception No. XVII. (Seventeenth Assignment of Error.)

This is directed to the conclusion of law made by the court that plaintiff is entitled to judgment against the defendant Employers' Fire Insurance Company in the sum of $1500.00 with interest. (See pages 124, 125 of Trans. of Record.)

In support of the contention of the plaintiffs in error that the evidence introduced at the trial of said cause was and is insufficient to justify this conclusion, and that the court in making the same committed error, plaintiffs in error rely upon the same facts, arguments and authorities that are referred to above under Exception No. XVI.

Exception No. XVIII. (Eighteenth Assignment of Error.)

This is directed to the making and entering in said cause of a judgment in favor of the plaintiff and against the defendants. (See page 126, Trans. of Record.)

In support of the contention of plaintiffs in error that the evidence introduced at the trial of said cause was and is insufficient to justify this judgment, and that the court committed error in ordering and directing the same to be made, we respectfully refer the court to all the facts, arguments and authorities hereinbefore referred to.

In conclusion, we respectfully submit, that, upon the grounds and for the reasons hereinbefore stated, the judgment made and entered in this cause in favor of the plaintiff therein and against the defendants, should not only be reversed, but that judgment should be ordered by this court to be made and entered herein in favor of the plaintiffs in error and against the defendant in error.

Dated, San Francisco,
April 25, 1928.

Respectfully submitted,
MILLER & THORNTON,
Attorneys for Plaintiffs in Error.